JUN 16 1944

Supreme Court of the United States

OCTOBER TERM, 1944.

No. [redacted] 4

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

ARTHUR A. BALLANTINE,
31 Nassau Street,
New York 5, N. Y.;

JOHN F. MACLANE,
120 Broadway,
New York 5, N. Y.;

FRANK A. REID,
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New York 6, N. Y.;
Counsel for Petitioner.

June 16, 1944.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. .

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

American Power & Light Company prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the First Circuit to review the decree of that Court entered in the above-entitled cause on March 17, 1944, affirming an order of the Securities and Exchange Commission (hereinafter referred to as the S. E. C.), dated August 22, 1942, directing that the petitioner be dissolved.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. §79x(a)) and Section 240(a) of the Judicial Code, as amended (28 U. S. C. §347(a)).

The Opinions Below.

The opinion of the Circuit Court of Appeals for the First Circuit (R. 868) was rendered on March 17, 1944 and is reported in 141 F. (2d) 606. On April 18, 1944 that Court handed down an order denying the petitioner's application for rehearing (R. 901).

The opinion of the S. E. C. rendered August 22, 1942 has not yet been officially reported. It is contained in the printed record (R. 523), and the S. E. C. has distributed it as its Holding Company Act Release No. 3750. On August 28, 1942, the S. E. C. denied the petitioner's application for rehearing (R. 677).

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. §79, hereinafter referred to as the "Act"). The S. E. C.'s order was made under Section 11(b)(2) of the Act (49 Stat. 820-1; 15 U. S. C. §79k(b)(2)). The portion of Section 11(b)(2) directly involved reads as follows:

> "(b) It shall be the duty of the Commission [the S. E. C.], as soon as practicable after January 1, 1938:
>
> • • • • • • •

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system."

Summary Statement.

The petitioner is a solvent corporation, organized under the laws of the State of Maine, which registered under the Act in 1938 (R. 537, 568, 659, 671). The petitioner is part of the Electric Bond and Share Company holding company system as defined in the Act, since Bond and Share owns more than 10% of the voting shares, namely, 2.9 per cent. of the preferred stock and 31.15 per cent. of the common stock of the petitioner, together constituting 20.7 per cent. of the voting power (R. 537-8).

The petitioner owns practically all the common stocks and some other securities of 15 corporations which are operating electric (and, in a few instances, gas) public utilities (R. 539, 659). Thus the petitioner and its subsidiaries themselves constitute a separate holding company system under the Act.

The petitioner's debentures are outstanding in the hands of over 10,000 public holders and there are over 34,000 public holders of the petitioner's preferred and common stocks. As the record shows, Bond and Share does not have anything like majority voting power in the petitioner. Bond and Share's control has stemmed from the fact that

the public security holders have voluntarily chosen to vote with Bond and Share (R. 616-7).

In May 1940, the S. E. C. instituted a proceeding under Section 11(b)(2) against Bond and Share, the petitioner and others (R. 27). By order dated June 7, 1940, the S. E. C. limited the proceeding (so far as it concerned the petitioner) to the issue whether under Section 11(b)(2) it was necessary to "discontinue the existence" of the petitioner "in order to ensure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among the security holders in that system." (R. 64). Hearings were held and thereafter, on August 22, 1942, the S. E. C. rendered its findings and opinion and entered the order in which it directed that the petitioner be dissolved, and that the petitioner and Bond and Share submit a plan or plans to the S. E. C. for the effectuation of the order (R. 523, 650).

The petitioner contends that Section 11(b)(2) of the Act under which the S. E. C. proceeded is unconstitutional, that the S. E. C. dissolution order deprives it of its property without due process of law, and that additional grounds hereinafter set forth also require that the S. E. C. order be set aside.

The Questions Presented.

I. Is Section 11(b)(2) of the Act unconstitutional:

(a) as not being within the power granted by the Constitution of the United States to the Congress to regulate commerce among the several States or any other power granted in the Constitution to the Congress?

(b) in that it authorizes depriving the petitioner of its property without due process of law and the taking of the petitioner's property for public use without just compensation in violation of the Fifth Amendment to the Constitution?

(c) in that it improperly delegates legislative functions to the S. E. C.?

(d) in that it is an *ex post facto* law prohibited by the Constitution?

(e) if it authorizes the S. E. C. to dissolve petitioner, a corporation of the State of Maine?

II. Is the S. E. C. order unconstitutional as depriving petitioner of its property without due process of law:

(a) in that the dissolution of this petitioner is an unreasonable, arbitrary and oppressive means of carrying out Section 11(b)(2) of the Act?

(b) in that the S. E. C. refused to take and consider evidence offered by the petitioner on the issues to be decided by the S. E. C., and the petitioner was thus denied a hearing?

(c) in that there is no basis in the record for the S. E. C. order, and in that the S. E. C. erred as a matter of law in its conclusion that there was an unfair and inequitable distribution of voting power and an undue and unnecessary complication of structure which would support the order?

(d) in that the purported findings relied on by the S. E. C. to support its order are fundamentally defective on their face?

III. Did the S. E. C., and the Circuit Court of Appeals in approving its action, err in refusing to accord the petitioner a hearing on its plan under Section 11(e) of the

Act for reorganization of its system so as to conform to the Act?

IV. Did the Circuit Court of Appeals err in refusing to consider the important issues of law listed in "V" below on the ground that they were not argued before the S. E. C.?

V. Should the orders of the S. E. C. dated August 22, 1942 and August 28, 1942 be set aside and the order of affirmance by the Circuit Court of Appeals be reversed on each of the following grounds which that Court would not consider:

(a) that Section 11(b)(2) of the Act does not authorize the S. E. C. to direct dissolution of any corporation?

(b) that the S. E. C. order is unenforceable and void because neither this petitioner nor Bond and Share nor the S. E. C. nor the Federal Court has any means of carrying out the dissolution of the petitioner?

(c) that the S. E. C. has not found and specified in its order, as expressly required by Section 11(b)(2), the steps which the petitioner must take and thereby seeks to deprive the petitioner of the period granted by Section 11(c) of the Act within which to comply with a definitive order under Section 11(b)(2)?

Specification of Errors to be Urged.

The Circuit Court of Appeals, in affirming the order of the Commission, erred on each and all of the grounds hereinbefore referred to.

Reasons Relied on for the Allowance of the Writ.

This Court has not yet passed on the constitutionality of Section 11(b)(2) of the Act or on the constitutionality

of any order of dissolution entered under the Act. Accordingly, in upholding the constitutionality of Section 11(b)(2) and of the dissolution order (Questions I and II above), the Circuit Court of Appeals for the First Circuit has decided important questions of Federal law which have not been, but should be, settled by this Court. We further submit that, in deciding these important Federal questions, the Court below has not followed applicable decisions of this Court arising under other statutes, and that as to certain important Federal questions (II(a), III, IV and V above), the Court below has denied to petitioner the right to the Court review which is granted it by the Act and, in doing so, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In *Landis* v. *North American Co.*, 299 U. S. 248 (1936), the Court referred to the importance and significance of the novel questions arising under the Act, saying (p. 256):

> "In these Holding Company Act cases great issues are involved, great in their complexity, great in their significance. * * * On the law there will be novel problems of far-reaching importance to the parties and the public."

This Court has also heretofore recognized that the constitutional questions presented by Section 11(b)(1) of the Act are of outstanding importance and should be passed upon by this Court. Thus, this Court has granted writs of certiorari in *North American Company* v. *Securities & Exchange Commission*, 318 U. S. 750, March 1, 1943, and in *Engineers Public Service Company* v. *Securities and Exchange Commission* (June 5, 1944), which involve the constitutionality of Section 11(b)(1) of the Act. If a writ is granted here opportunity is afforded for a final adjudica-

tion of the constitutionality of both Sections 11(b)(1) and 11(b)(2), which has been and still is involved in so many cases before the Securities and Exchange Commission and the Courts.

In addition to the broad questions underlying both Sections 11(b)(1) and 11(b)(2), the latter sub-section presents further questions not involved in the former. Section 11(b)(2) is vague and general, both with regard to the matters falling under its operation and with regard to the remedy to be applied thereunder, and it has here resulted in an order for the dissolution of a state corporation which is not even claimed to have violated any Federal or state law. Before passage of the Act, so far as we can find, no order of dissolution of a state corporation had ever been entered by any Federal Court where the corporation had not been found guilty of violation of a Federal law,—and even in the cases where a state corporation had been found guilty of violation of a Federal law the order has provided for corporate dissolution only where there was consent to that feature of the order.

WHEREFORE, it is respectfully submitted that because of the importance of the Federal questions presented and the other reasons set forth above, this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the First Circuit should be granted.

AMERICAN POWER & LIGHT COMPANY,
Petitioner.

By: ARTHUR A. BALLANTINE,
JOHN F. MACLANE,
FRANK A. REID,
Counsel for Petitioner.

June 16, 1944.

BRIEF IN SUPPORT OF PETITION.

This brief contains a summary discussion of each of the questions of law presented in the petition.

I (a). **Section 11(b)(2) is not within any Congressional power.** The question of the power of Congress to enact Section 11(b) of the Act was the subject of wide discussion even before the Act was passed. It was sought to bring this constitutional question before this Court in 1938 (*Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938)), but the Court held that the constitutional questions raised by Section 11(b) were not before it for decision in that case and that it would consider only the validity of the registration provisions of the Act (Sections 4 and 5).

The present case is the first one coming before this Court in which the S. E. C. has actually pronounced a "death sentence", that is, has ordered a corporation to be dissolved and its existence terminated, so that the questions held by this Court not to be presented in the *Electric Bond and Share* case are here presented for determination, and should be settled by this Court.

The only constitutional basis urged as support for Section 11(b)(2) is the Federal power over interstate commerce. But the sub-section cannot be sustained as an exercise of that power.

No mention of interstate commerce appears in Section 11(b)(2). The registration provisions of the Act (Sections 4 and 5) mention interstate commerce but these provisions are so broad that corporations are brought under Section 11(b)(2) irrespective of their being engaged in commerce or affecting commerce. The findings contained in Section 1 of the Act also mention interstate commerce, but they amount to no more than general statements that

public utility holding companies and their subsidiaries "often" engage in interstate commerce and that an investigation has disclosed various evils in the public utility field. These findings cannot properly be found to be a basis for the almost unlimited scope of Section 11(b)(2).

If the decision below holding Section 11(b)(2) to be within the power of Congress were correct, then it would seem that Congress could validly enact a statute reciting that because "many" corporations are engaged in interstate commerce and some evils have arisen in connection with corporate business, a commission is to be appointed to take jurisdiction over *all* corporations to alter the distribution of voting power in, or the corporate structure of, any of them or terminate their existence. It has not heretofore been thought that legislation as sweeping as that could be rested by Congress on any of the powers granted it in the Constitution.

The sub-section is certainly not based on the bankruptcy power. It is not limited in its application to corporations which are insolvent in either the equity or bankruptcy sense.

Since Section 11(b)(2) is not confined in its operation to interstate commerce but matters not included within the commerce power are "so interblended in the statute that they are incapable of separation", the decision of the Court below, holding Section 11(b)(2) to be within that power of Congress, is in conflict with applicable decisions of this Court. (*Hill* v. *Wallace*, 259 U. S. 44, 68 (1922); *The Employers' Liability Cases*, 207 U. S. 463, 504 (1908)).

I (b). **Section 11(b)(2), if interpreted as authorizing the order of the S. E. C. herein, violates the Fifth Amendment to the Constitution by taking petitioner's property for public use without just compensation and depriving petitioner of its property without due process of law.** Dissolu-

tion of the petitioner under Section 11(b)(2) takes its property by destroying its corporate franchises granted to it by the State of Maine, takes its right to exist under such franchises, takes by destruction the value of property rights inhering in the great costs heretofore incurred in organizing and financing petitioner and takes from the petitioner its right to retain its investments in the stocks and other securities of its subsidiaries. Dissolution also takes from the petitioner's 44,000 security holders their right to retain their direct investments in the petitioner and their indirect interests, through the petitioner, in the petitioner's subsidiaries. These property rights are of great value. They are taken under Section 11(b)(2) for the sole purpose of creating theoretically ideal structures in the public utility field which is deemed to benefit the public generally. We submit that the decision of the Court below upholding the taking of such private property for such a public purpose without a condemnation proceeding and payment of just compensation is in direct conflict with the decisions of this Court in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935) and in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922).

If the decision of the Court below is to stand, then it constitutes a holding that the Federal Government, in exercising its commerce power, or any state government, may decree for any reason which it views to be in the public interest that an existing corporation, which was not set up in violation of any law (whether it be an agricultural corporation or a railroad corporation or a church or a university) shall be dissolved, or that such a corporation, or any individual, has too much property and must sell most of it within, say, two years to those who may wish to buy the property. It is for this Court to settle the question whether

such a taking of property is barred by the Fifth and Fourteenth Amendments in the absence of a condemnation proceeding and payment of just compensation.

Section 11(b)(2) also violates the due process clause because, in subjecting a corporation to involuntary reorganization, it does not contain the minimum safeguards required even for a reorganization forced by an exercise of the bankruptcy power. Here again, it had never been held by this Court, or so far as we know, before passage of the Act, by any Court, that where a corporation had not been guilty of violation of any law, it could be reorganized by a simple fiat of a Federal commission without even a vote of the security holders.

The Court below held that, if the taking of property under Section 11(b)(2) is not "capricious," it did not constitute a taking of property requiring payment of just compensation (R. 897). We submit that this is not and cannot be the test of whether property may be taken without compensation. It has never been the law that property condemned for a public improvement may be taken without compensation merely because the improvement is planned and deliberate and, therefore, not capricious.

I (c). **Section 11(b)(2) improperly delegates legislative functions to the S. E. C.** Section 11(b)(2) nowhere sets forth any standard or principle to guide the S. E. C. in issuing orders thereunder. The sub-section provides that it is called into action when there is an undue or unnecessary complication of structure or an unfair or inequitable distribution of voting power in a holding company system. We submit that this does not constitute anything like a reasonably definite standard.

With terms as vague as these (having no common law meaning and never used in any statute before passage of

the Act) the S. E. C. is given unlimited power to create its own definitions of what is, and what is not, allowable in a holding company structure. The S. E. C. is free to come to different conclusions on similar states of facts appearing in different cases or to change at whim, from case to case, the application it makes of these phrases because there is no standard to which it can be held (*Cf.*, for example, the order in *The United Corporation*, S. E. C. Holding Company Act Release No. 4478, August 16, 1943). Furthermore, the action to be taken by the S. E. C. when it finds these conditions to exist is not specified in Section 11(b)(2) which purports to authorize the S. E. C. then to "take such steps as the Commission shall find necessary".

We find no decision of this Court relating to other statutes which upholds so vague a delegation of legislative power.

We submit that, in holding valid the delegation of legislative power contained in Section 11(b)(2), the decision of the Court below is in conflict with *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), and *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935).

I (d). **Section 11(b)(2), as construed by the S. E. C. in the present case, is an *ex post facto* law prohibited by the Constitution.** The findings and opinion of the S. E. C. are largely devoted to a criticism of acts committed in the past in building up the structure of the Bond and Share holding company system. The opinion charges Bond and Share with having derived undue profits through its control of the petitioner and other corporations. However, there is no claim that any act of Bond and Share was in conflict with any Federal or state law. If these past acts of Bond and Share determine whether there is now an unfair or inequitable distribution of voting power and

undue or unnecessary complication of structure and also can be used, not merely as a basis for an order against Bond and Share, but as the basis of an order against this petitioner, then Section 11(b)(2) is an *ex post facto* law of the worst possible type.

The Court below held that it was immaterial under Section 11(b)(2) how the present structures were built up (thus in effect holding that the greater part of the findings and opinion of the S. E. C. were irrelevant) and therefore, that Section 11(b)(2) was not an *ex post facto* law (R. 898-9). But the Court also held that the Commission's conclusions were not based on present valuations and therefore that the petitioner's valuation evidence was properly excluded by the S. E. C. (R. 888). This, it seems to us, leaves nothing on which the Commission's conclusions may rest, since both the past facts and the central present fact are held irrelevant. It would seem to be obvious that the S. E. C. order has no basis at all unless it rests on past facts or present facts, and that the Court below erred in holding that it was valid even if it rests on neither.

We submit that, to the extent that the order is sought to be rested on the past facts which make up a large portion of the S. E. C. opinion and the dissolution of petitioner is grounded on the alleged past sins of Bond and Share, the order is based on a construction of Section 11(b)(2) which makes it unconstitutional as an *ex post facto* law imposing punishment for acts legal when done.

Fletcher v. *Peck*, 6 Cranch, 87 (1810);
Cummings v. *State of Missouri*, 4 Wall. 277 (1866);
Ex Parte Garland, 4 Wall. 333 (1866);
Pierce v. *Carskadon*, 16 Wall. 234 (1872).

I (e). **Congress has not the power to authorize the S. E. C. to dissolve a Maine corporation.** Until the decision was rendered below, no Court seems to have held that the Federal Government had the power to order dissolution of a state corporation. The authorities were uniformly to the effect that there was no such power,

Chicago Title and Trust Co. v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U. S. 120, 127 (1937);

Society for the Propagation of the Gospel v. *Town of New Haven*, 8 Wheat. 464, 483 (1823);

Lillard v. *Lonergan*, 72 F. (2d) 865, 870 (C. C. A. 10th, 1934), cert. den. 293 U. S. 615;

Maguire v. *Mortgage Co. of America*, 203 Fed. 858, 859 (C. C. A. 2nd, 1913);

Syrian Antiochean St. George's Orthodox Church v. *Ghize*, 258 Mass. 74 (1927), 154 N. E. 839, 842;

Commonwealth v. *First National Bank and Trust Co.*, 303 Pa. 241 (1931), 154 A. 379, 380;

Sun River Stock & Land Co. v. *Montana Trust & Savings Bank*, 81 Mont. 222, 262 P. 1039 (1928).

Even in the situations where it was found that state corporations had violated a Federal law, such as the Sherman Act, no case has been found where the Federal Courts have decreed dissolution in a contested proceeding. Under the Sherman Act, the Federal Courts have terminated *combinations* in restraint of trade, effected *after* the passage of that statute *and in violation of* that statute through the medium of state corporations, but they have not purported to decree destruction or dissolution of the state corporation. For example, the most drastic action taken by the

Federal Government under the anti-trust laws is represented by the decisions in:

Northern Securities Co. v. *U. S.*, 193 U. S. 197 (1904);

U. S. v. *Reading Co.*, 253 U. S. 26 (1920) (and *Continental Co.* v. *U. S.*, 259 U. S. 156 (1922), further proceedings in same case.)

In the *Northern Securities Co.* case, *supra*, this Court, referring to the lack of Federal power to dissolve state corporations, said (at p. 346):

> "The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company."

The Court below tacitly conceded the validity of petitioner's contention that the Federal Government has not the power to dissolve a state corporation, but held that the order, while directing dissolution and termination of existence, could be considered as something else, namely, an order for complete liquidation, that complete liquidation is the practical equivalent of dissolution and that an order for complete liquidation of a state corporation is within the power of the Federal Government (R. 894). For the authority to order complete liquidation the Court below referred only to cases involving violation of the anti-trust laws, while the petitioner here is not claimed to have violated any law. But leaving that aside, we submit that the S. E. C. order must be tested by what it directs, rather than by what it might have directed, and that since it

directs dissolution of a state corporation, which is clearly beyond the power of the Federal Government as shown by the authorities cited above, including decisions of this Court, the dissolution order should have been set aside.

II (a). **The S. E. C. order for the dissolution of this petitioner is an unreasonable, arbitrary and oppressive means of carrying out Section 11(b)(2), and therefore deprives petitioner of its property without due process of law.** As has already been set forth, Bond and Share owns securities of the petitioner giving it 20.7% of the voting power. The remaining 79.3% of the voting power is in the hands of 34,000 public stockholders of the petitioner. On the S. E. C.'s calculations, Bond and Share owns less than 4½% in book value of the petitioner's stock (R. 537-8). The S. E. C. has found that control of the petitioner through this small interest causes an unfair and inequitable distribution of voting power and an undue and unnecessary complication of structure in the Bond and Share holding company system, consisting, under the Act, of Bond and Share as the top holding company, the petitioner as the intermediate holding company, and the petitioner's operating subsidiaries. The S. E. C. proceeding was expressly limited to the petitioner's effect on the Bond and Share system and no issue was raised as to the petitioner's own system (R. 64).

Petitioner contended below that the remedy for the statutory wrong found to exist should be to order Bond and Share to divest itself of the securities it owned in the petitioner and thus eliminate the petitioner from its system. Instead, the S. E. C. ordered the dissolution of the petitioner.

The Court below referred to the petitioner's contention as "somewhat plausible" (R. 889), but said that Courts are

loathe to set up their own judgment in opposition to that of the administrative tribunal and that dissolution of the petitioner would "ensure" that it no longer had an adverse effect on the Bond and Share system (R. 888-9). The Court below refused to weigh any method of carrying out Section 11(b)(2), as against the S. E. C.'s method of dissolving the petitioner, on the ground that the method used by the S. E. C. did "ensure" the carrying out of that provision. Also, the Court below improperly went outside the record and outside the issue in this proceeding for support for this ruling. It referred (R. 889) to possible problems not known to the Court but which might be before the S. E. C. in other proceedings involving Bond and Share, a consideration wholly foreign to the present proceeding; and it said (R. 890) that severance of Bond and Share from petitioner would leave untouched whatever defects there were in the petitioner's own system, notwithstanding that this proceeding had been expressly limited by the S. E. C. to consideration of alleged defects in the Bond and Share system.

This ruling by the Court below was in effect an abrogation of the judicial function by denial of the right of Court review expressly granted by Section 24(a) of the Act, and a denial of due process. Reduced to its simplest terms, the Court below has announced the principle that a remedy need not be commensurate with or proportional to the wrong but that capital punishment, being a universal solvent, cures all ills and may be applied in every case.

II (b). **Petitioner was denied the hearing to which it was entitled under the due process clause of the Fifth Amendment by reason of the S. E. C.'s refusal to take and consider its valuation evidence.** The S. E. C. staff at the hearings before the Examiner introduced in evidence com-

putations designed to raise the question as to whether the equity of the petitioner in its subsidiaries as appearing from the books of account was too high because of inflated asset values and inadequate depreciation reserves. In its findings and opinion, the S. E. C. expressly refrained from finding that these computations were correct, but it nevertheless proceeded to deduct the amounts thereof from the petitioner's book equity, thereby reducing the 69% book equity to 4.75%, and then held that control by the petitioner of its subsidiaries with so small an interest therein was forbidden by Section 11(b)(2) (R. 619-22).

To meet these unsupported computations which the S. E. C. used in its findings and opinion, the petitioner at the hearings before the Examiner offered evidence designed to show the true values of the properties (*e. g.*, R. 239-41, 254-5). This valuation evidence was based on data as to earning power, physical values and the amount of adequate depreciation. The Examiner excluded this evidence (R. 246-7) and both the S. E. C. (R. 532) and the Court below (R. 887-8) have sustained the exclusion of the evidence on the ground that there was no issue of present value in the proceeding.

It would seem clear, as already stated, that Section 11(b)(2) and the S. E. C. order of dissolution must be based either on events occurring in the past or on present facts, and that if the S. E. C. order represents punishment of the petitioner for alleged sins of Bond and Share in the past, Section 11(b)(2), so construed, is an *ex post facto* law (Point I(d) above). Here we point out that if Section 11(b)(2) is called into operation by present facts, then the central present fact determining whether there is an unfair or inequitable distribution of voting power and an undue and unnecessary complication of structure is the valuation of the respective interests of security holders in petitioner

and its subsidiaries. The S. E. C. findings and opinion indicate this by measurement of the respective interests in percentages arrived at by deduction of huge hypothetical amounts of alleged asset inflation and huge hypothetical amounts of alleged under-depreciation in the accounts of these subsidiaries (R. 619-20, 665). Yet, when petitioner sought to meet these unsupported hypotheses by actual evidence of value, that evidence was excluded on the ground that there was no issue of valuation. This was clearly error, because if Section 11(b)(2) is valid the conclusions thereunder in this case must have been based on present relative values of the various interests, and the S. E. C. in its findings and opinion did in fact purport to measure the relative interests in coming to its conclusions.

The Court below, in sustaining the S. E. C. order notwithstanding exclusion of petitioner's valuation evidence, said that it "should indulge the presumption that the Commission and its lawyers would know enough not to commit the egregious blunder" of excluding the valuation evidence while still deciding the case on a valuation issue (R. 888). By indulging this presumption, contrary to facts of record, the Court in effect denied the petitioner a review of the Commission's action. The valuation evidence was in fact excluded and the decision of the Commission was based on a valuation issue, *i. e.* the present size of the relative interests in the corporation involved.

We submit that the Court below, in sustaining the exclusion of the petitioner's valuation evidence by the S. E. C., has decided a Federal question in a way in conflict with the following decisions of this Court which have held refusal of a hearing on evidence which is relevant and material to be a violation of the due process clause of the Fifth Amendment or of the Fourteenth Amendment:

Chicago Junction Case, 264 U. S. 258 (1924);

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38 (1936);
Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio,* 301 U. S. 292 (1937);
Morgan v. *United States,* 304 U. S. 1 (1938);
National Labor Relations Board v. *Indiana & Michigan Electric Co.,* 318 U. S. 9 (1943).

II (c). The S. E. C. dissolution order deprives petitioner of its property without due process of law because, as a matter of law, there was no basis in the record for the S. E. C.'s conclusion that there was an unfair and inequitable distribution of voting power and an undue and unnecessary complication of structure.

1. As to alleged unfair or inequitable distribution of voting power.

The S. E. C. opinion does not say who is now being unfairly or inequitably deprived of voting power. It announces merely the general conclusion that unfair or inequitable distribution of voting power does exist. In these circumstances, the only way to ascertain who is supposed to have too much voting power and who too little, is to consider to whom voting power is redistributed by the order of dissolution.

The order affects only the voting power of petitioner's stockholders. The petitioner's stockholders consist of Bond and Share and the public stockholders, Bond and Share having 20.7% of the voting power and the public stockholders 79.3% (R. 617). The S. E. C. has never claimed that the public stockholders of the petitioner have unfairly large voting power and it is clear that they do not have. But is is equally clear that Bond and Share's holdings of petitioner's stocks do not give it voting control but such

control stems from the fact that the public stockholders, as shown by the record, have for many years voluntarily voted their stock with Bond and Share (R. 617).

There simply was no basis in the record for finding that anyone was unfairly deprived of voting power, and, this being so, the S. E. C. order should have been set aside by the Court below. Instead, that Court merely said that, in making its order, the S. E. C. relied upon a historical survey of how the Bond and Share system was put together, and upon a consideration of the investments of Bond and Share and the petitioner compared with the total book capitalization of petitioner's subsidiaries (R. 887). Not only do these not support the findings, but, being conclusions on historical facts leading up to the present state of facts rather than on the present state of facts themselves, their adoption as the basis for decision makes the order an unconstitutional *ex post facto* penalty for past acts which were legal when done.

2. As to alleged undue and unnecessary complication of structure.

Section 11(b)(2) does not contemplate that three-layer holding company systems *per se* constitute an undue or unnecessary complication. The "great-grandfather" clause of the sub-section forbids only four-layer systems.

There is nothing unusually complicated in the Bond and Share holding company system with the top holding company having outstanding preferred and common stock, the petitioner, as the intermediate holding company, having outstanding debentures, preferred stock and common stock, and the operating subsidiaries in turn having outstanding bonds, preferred stock and common stock. Contrasted with such a holding company system, the corporate structure of many railroad and industrial systems would be infinitely

more complicated. The extreme illustrations of greater complexity cited by the S. E. C. are occasional, unimportant, and without substance in relation to the issues in the proceeding.

The S. E. C. findings and opinion (R. 634) and the opinion of the Court below (R. 884) state that the petitioner is "unnecessary" because it does not actually supervise the detailed operation of its subsidiaries. Of course the petitioner is not "necessary" for the purpose of doing a great many things which it was not organized to do and never intended to do. Such supervision is not an inherent holding company function.

Neither the S. E. C. nor the Court below paid any attention to the fact that the petitioner performs the functions which it was organized to perform, that those functions are important to the investors in the petitioner, and that the petitioner therefore can in no sense be considered "unnecessary". The petitioner has performed the economic functions for its investors of diversifying for them their investments in the public utility field in fifteen public utility operating companies, of acting as a medium through which the investors can concentrate and make effective their votes on the common stocks of the operating subsidiaries, of servicing their investment both indirectly in these subsidiaries and directly in petitioner, and of realizing large annual income tax savings (in excess of the entire expense of operating petitioner) through ability to file consolidated income tax returns, and like benefits.

We submit that this Court should pass on the important Federal question of the meaning of the phrases used in Section 11(b)(2) and whether the Court below correctly held that such phrases could be applied to the simple essential facts here presented.

II (d). **The petitioner has been denied due process within the Fifth Amendment by being ordered to be dissolved on the basis of S. E. C. findings which are fundamentally defective on their face.** In its findings and opinion the S. E. C. comes to the conclusion that the facts fall within Section 11(b)(2), stating that it does so "On the basis of the foregoing figures" (R. 622). As appears from the "foregoing figures", the significant figure is 4.75% (R. 620) which the S. E. C. says is the percentage of the capitalization of the petitioner's subsidiaries, "as adjusted", owned by the petitioner. On the face of the opinion, the 4.75% which is supposed to represent the small interest of the petitioner in the subsidiaries is not supported by anything to which the S. E. C. or the Court below was entitled to give weight.

1. The 4.75% figure is arrived at by deducting $188,425,387 as the amount of hypothetical write-ups of assets and $94,821,042 as the amount of hypothetical deficiencies in depreciation or retirement reserves (R. 619-20, 665). The S. E. C. carefully refrained from making any finding that these amounts are properly deducted. The findings and opinion refer merely to "apparent" system write ups and to the possible necessity of an adjustment in depreciation or retirement reserves (R. 619-20). Conclusions may not be predicated on such unexplored possibilities.

2. The 4.75% figure is also fallacious in that it is applied as a blanket deduction against petitioner's total investment in subsidiaries, regardless of the character of that investment (*e.g.*, bonds or preferred stock) and is arrived at by the addition of plus and minus quantities, so that a negative investment in one subsidiary (*i.e.*, alleged insufficiency of assets to meet securities senior to those held by petitioner)

is deducted from the positive investment in other subsidiaries (R. 619-20, 665).

If these unjustified and fallacious adjustments and deductions had not been made, there would remain only the book figures which showed that the petitioner held 69% of the equity in its subsidiaries, and the excluded valuation evidence which would have shown that the petitioner held even a greater percentage of such equity, and these figures entitle the petitioner to the majority voting power in the subsidiaries.

In refusing to set aside the S. E. C. order because of these fundamental defects appearing on the face of the S. E. C. findings the decision of the Court below was in conflict with this Court's decision in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 74 (1936) and the other decisions of this Court which are cited in that opinion.

III. **The S. E. C., and the Court below in approving its action, erred in refusing to accord the petitioner a hearing on its plan of reorganization.** We submit that this action of the S. E. C. sustained by the Court was a clear abuse of the statutory processes outlined in Section 11 considered as a whole, and an express denial to petitioner of the rights accorded to it by Section 11(e). Without extended argument it seems clear that the procedure envisaged by Congress in enacting Section 11 was that the S. E. C. should first make a comprehensive survey of each public utility system and find wherein it fails to conform to the Act and indicate the "steps" required to be taken to align it with the statutory requirements. Thereupon two alternatives are presented. Under Section 11(b), either (1) or (2), or both, the S. E. C. may make an order defining those steps and requiring the company to conform thereto,

or the company may submit, under Section 11(e), a plan of compliance. As will appear hereinafter, the S. E. C. failed to define the steps required to be taken by petitioner to comply with the sub-section. It also refused a hearing on the plan presented by petitioner proposing a method of compliance (R. 532-3).

IV. **The Court below erred in refusing to consider certain contentions of the petitioner on the ground that they were not argued before the S. E. C.** An important contention which the Court below refused to consider was the contention that Section 11(b)(2) was not intended by Congress to authorize dissolution of any corporation. The Court below based its determination that it would not consider this question (which, with the other questions not considered, will be discussed in Point "V" below) on the following sentence in Section 24(a) of the Act:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do."

We think that the Court below wholly overlooked the latter portion of this sentence of the statute relating to the existence of reasonable grounds for not detailing objections before the S. E. C. The S. E. C. had already entered a series of similar dissolution orders in other cases, thus repeatedly deciding that it had the power under Section 11(b)(2) to order dissolution and to enter the form of order entered in the present case. In the summer of 1942 the proceeding against the petitioner had gone on for over two years, the record already included over 18,000 pages of testimony and 2,400 exhibits, the parties were fully advised of each others' views, and counsel for petitioner entered

into an agreement with S. E. C. counsel for closing the voluminous record. Shortly thereafter, proposed findings were presented to petitioner and contained a dissolution order of the type which the S. E. C. had entered in other proceedings. To bring the case to a close without further formality or delay, the petitioner reserved by stipulation with S. E. C. counsel "full judicial review of the said findings, opinion and order" of the S. E. C. (R. 521). This is recognized by the findings and opinion of the S. E. C. in its statement that "Respondents do not acquiesce in the present findings and conclusion or in the order to be entered hereon, and that they expressly reserve all legal and constitutional rights" (R. 528). This was clearly an acknowledgment of notice to the S. E. C. that the petitioner reserved the right to challenge, on all available grounds, its legal authority to dissolve the petitioner.

Furthermore, the questions which the Court below refused to consider are pure questions of law presented by the text of the statute itself, and the stipulation with S. E. C. counsel, the statement in the S. E. C. opinion, the line of decisions theretofore rendered by the S. E. C., and the other surrounding facts should have been held to constitute adequate notice to the Commission of the reservation of these questions, and a good and sufficient reason for failure to make any further or more specific challenge such as the Court below holds was required.

We submit that, in these circumstances, it was a denial of justice to penalize the petitioner for expediting the proceeding as set forth above.

We further submit that such a question as whether Section 11(b)(2) authorizes the S. E. C. to order dissolution of any corporation is not the type of question which falls within the above quoted sentence from Section 24(a). If

the S. E. C. is not granted the power to direct dissolution by statute, then its order is *ipso facto* void. That question is in its nature jurisdictional since it goes to the power to make the order.

V (a). **Section 11(b)(2) does not authorize the S. E. C. to direct dissolution of any corporation.** There is no reference in Section 11(b)(2) or in any other portion of the Act to any authority being granted to the S. E. C. to dissolve any corporation. The fact is that there was a purported grant of such authority to the S. E. C. in the original bills introduced in the Senate and the House, but these were stricken from the bill finally passed by Congress.

The statement in clause 1(e) of the Act that one purpose of Congress was "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title" cannot be construed to sustain the power to *dissolve* corporations, particularly in the face of Congressional action removing authority to dissolve from Section 11(b)(2). There is no reference in the clause just quoted to dissolution of any corporation but simply to "elimination" of holding companies, "except as otherwise expressly provided." The meaning of "to eliminate" is not "to destroy" but is "to thrust out", "to remove and get rid of by disengaging from environment or associations" (Webster's New International Dictionary, Second Edition). A holding company can be eliminated simply by making it divest itself of stock in an operating company or in an intermediate holding company or give up its vote on such stock. Carrying out the provisions of Section 11(b)(1) eliminates holding companies to a substantial degree, limiting existence generally to one integrated public utility system, as defined in the Act.

In any event, the action of Congress in striking out express authority to dissolve corporations from Section 11(b)(2) before passage of the Act, is controlling and precludes its reinstatement by judicial construction.

Pennsylvania Railroad Co. v. *International Coal Mining Co.*, 230 U. S. 184 (1913);
Carey v. *Donohue*, 240 U. S. 430 (1916);
Helvering v. *Wood*, 309 U. S. 344, 348 (1940).

We submit that this Court should decide the important Federal question whether Section 11(b)(2) authorizes the S. E. C. to dissolve any corporation.

V (b). **The S. E. C. dissolution order is void because it is unenforceable.** The S. E. C. by its order directed the petitioner and Bond and Share to effect the dissolution of the petitioner. They are powerless to do so. Under the laws of the State of Maine, where the petitioner is incorporated, a corporation can be dissolved only by order of a Court of the State of Maine and after affirmative vote of stockholders in favor of dissolution at a meeting called for the purpose, at which a quorum, consisting of the holders of a majority of the voting stock, must be present in person or by proxy (Maine Revised Statutes (1930), Chap. 56, Sec. 90), or by a court of the State of Maine under other circumstances not relevant here, such as insolvency (Id., Sec. 83).

Under these statutes of Maine, the petitioner is powerless to effect its own dissolution and Bond and Share is also powerless to dissolve the petitioner since it has only 20.7% of the voting power in American.

Furthermore, under the enforcement provisions of the Act contained in Sections 11(d) and 18(f), the Federal Courts cannot take jurisdiction to enforce this order which

petitioner and Bond and Share cannot carry out under the Maine statutes.

V (c). **The form of the S. E. C. order is improper under Section 11(b)(2).** Section 11(b)(2) directs the S. E. C. in an order under that sub-section to require that the corporation "shall take such steps as the Commission shall find necessary to ensure * * *". The S. E. C. order for dissolution of petitioner merely provides that the petitioner shall be dissolved and that the petitioner and Bond and Share shall submit a plan and take such other steps as may be necessary to effectuate the order (R. 651). Therefore, the S. E. C. order does not conform to Section 11(b)(2) because it fails to specify the steps to be taken by the petitioner in carrying out the order, but on the contrary leaves those steps for later formulation. We submit that the Court below should have held that the failure of the S. E. C. to specify in its order the "steps" to be taken as required by Section 11(b)(2) made the order void. The practical effect which the S. E. C. seeks to accomplish by this form of order is to deprive petitioner of the statutory time (one to two years) allowed by the statute for accomplishment of the concrete steps which the statute requires the S. E. C. to specify.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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